

**In the
Indiana Supreme Court**

No. 49S02-____-CV-____

SUSANA HENRI,

Appellant (Plaintiff below),

v.

STEPHEN CURTO,

Appellee (Defendant below).

Appeal from the Final Judgment of the
Marion Superior Court

Cause No. 49D02-0412-CT-002275

The Honorable Kenneth H. Johnson,
Judge

APPELLEE'S PETITION TO TRANSFER

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On May 9, 2005, before a trial had taken place, Ms. Henri's attorney issued a "press release," attaching a copy of the lawsuit. (Appellee's Br. 10; Add.Tab#2.) Henri approved the press release. (Appellee's Br. 10.) The press release began:

Butler Pharmacy Student Is Willing to Go Public about Being Date-raped

Susana Henri was dated-raped by Stephen Curto in March, 2004, and is willing to go public to describe her ordeal. Ms. Henri is a 3rd year pharmacy student at Butler University, and is a member of Butler's volleyball team. Mr. Curto was also a student, and played football for Butler.

(Add.Tab#2.) Curto eventually counterclaimed for tortious interference with a contract against Henri, alleging that her statements caused Butler officials to expel him. (App. 29-32.) The case eventually went to trial.

On the civil rape claim, the jury unanimously found against Henri and in favor of Curto. (Appellant's App. 4.) On the tortious interference counterclaim, the jury unanimously found in favor of Curto and awarded him \$45,000. (Id.) Henri appealed. In a 2-1-1 published opinion, the Court of Appeals reversed, setting aside the jury's verdict, resulting in another trial for these two families. See Henri v. Curto, 891 N.E.2d 135, 144 (Ind. Ct. App. 2008). The jury's verdict that Curto had not raped Henri was overwhelmingly supported by the evidence but never discussed by the Court of Appeals.¹

¹ The two students met at a house party just off campus, were drinking, and eventually became intoxicated. (Appellee's Br. 6: containing record citations.) Henri declined her friends' offer to leave the party and chose to stay. (Id.) She and Curto danced, physically "grinding" on each other. (Id.) Henri and Curto eventually decided to leave the party. (Id.) Curto twice offered to go to his dorm room, which was close by and where they would not be alone because he had two roommates (Id. at 6-7.) Henri instead invited Curto to her private dorm room, which was farther away

After the evidence had closed and about “twenty minutes into deliberations,” a juror summoned the bailiff and asked if the jury’s “decision would have to be unanimous.” Henri, 891 N.E.2d at 137, 141. The bailiff consulted with the judge, and returned to tell the jurors, “keep deliberating until [you] reach a unanimous verdict.” (Id.) Final Instruction 15 – never acknowledged by the Court of Appeals but briefed by Curto and discussed during oral argument (which was webcasted and is now available for viewing) – had similarly stated: “In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.” (Add.Tab#3: Instruction #15 provided by Curto because Henri’s appendix only contains instructions ## 14, 16, and 17). The same instruction also clarified that each juror “should not surrender [their] honest conviction as to the weight or effect of the evidence

but where they would be alone. (Id.) Prior to that night, Curto had not met Henri and did not know where she lived. (Id. at 7.) Henri led Curto to her dorm room, and used her key to let him in. (Id.) Curto went to use her bathroom. (Id.) Henri then sat down to email to her boyfriend that she could not pick him up from the airport the next morning (he was out of state). (Id.) When Curto returned, Henri had removed her shirt and pulled down her strapless bra while at the computer. (Id.) At that point, he stated, “she told me to come over to the computer” where she started “touching me and kissing me,” which eventually led to sexual intercourse (id.), but not before Curto put on a non-lubricated condom. (Id.) At one point, Henri was on top of Curto during intercourse. (Id.) While having intercourse, both Henri and Curto were intoxicated. (Id.)

Henri eventually became sick and asked Curto to stop having intercourse. (Id.) He complied. (Id.) Instead of leaving Henri alone, Curto stayed with her and put a trash can next to her bed in case she vomited because he was worried that she might get sick while sleeping and asphyxiate and die. (Id. at 7-8.) He asked if he could sleep on the floor; she said alright. (Id. at 8.) Curto eventually left Henri’s dorm room that night but only to sleep on a couch still near her dorm room. (Id.) On Sunday at about 11:30 a.m., Curto awoke and returned to his own dorm room. (Id.) Also on Sunday, Henri’s boyfriend returned and noticed a condom wrapper under her bed. (Id.) Before that discovery, Henri had not told her boyfriend that she had been with someone the night before while he was gone. (Id.) The remainder of the trial evidence is discussed in detail in the Appellee’s Brief, at pages 8-10.

solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.” (Id.)

About two (2) hours later (Appellant’s Br. 42), the jury returned a verdict in favor of Mr. Curto, finding he did not rape Ms. Henri, and awarding him \$45,000 on his tortious counterclaim. Henri, 891 N.E.2d at 137. After the trial, all jurors (including the affiant juror) were polled and agreed with the verdict, both as to the non-rape *and* the \$45,000 counterclaim award. (App. 9: MTCE Order.) Also, the affiant juror passed the judge in the hall afterwards and stated it was “a difficult verdict.” (Id. at 4.)

Judges Riley and Robb voted to set aside the jury’s verdict, believing prejudice had not been rebutted because they believed that the bailiff’s comment misstated the law concerning a possible mistrial or hung jury. Henri, 891 N.E.2d at 141 (citing I.C. § 34-26-1-7). The Chief Judge dissented, calling the majority’s ruling a “radical act.” Henri, 891 N.E.2d at 146. He also disagreed with the majority and concurrence’s rule that a trial judge has no discretion to consider other evidence about the fairness of the deliberations before him, noting this conflicted with Myers v. State, 887 N.E.2d 170, 195 (Ind. Ct. App. 2008). The concurring opinion countered that reversal was “not ‘radical’” and stated: “The law does not support weighing the allegations in a juror’s affidavit against the juror’s conduct at trial in order to determine which assertions are truthful as the dissent suggests.” Henri, 891 N.E.2d at 144-45.

The majority's decision to set aside the jury verdict was also based on two "outside influences": (i) a juror's brief response to a cell phone call, and (ii) the antics of an annoying alternate juror. Id. at 142-44. As for the cell phone response ("[I'll] get to class as soon as [I can]"), the majority held it was an independent basis to set aside the verdict, id. at 143, discussing its dicta in Pagan v. State, 809 N.E.2d 915 (Ind. Ct. App. 2004), but not Pagan's holding which reached an opposite result. Henri, 891 N.E.2d at 143. Commenting on both alleged "outside influences," the dissent felt it "could not be clearer" that neither instance met "the high bar such that reversal is warranted." Id. at 146.

The two judges did vote to strike part of Henri's appellate brief, where she had stated she was "raped once by Curto and then raped again by the judicial system." Id. at 137 n.3. However, the majority rejected Curto's claim for appellate fees, stating that his basis for fees was "for having to defend his judgment on appeal." Id. That was not Curto's basis for seeking fees. Curto sought fees because Henri's appellate brief repeatedly defamed him by calling him a "rapist" without any qualification. (Appellee's Br. 28-34.) Her press statement had done the same thing. (Add.Tab#2.) Curto now seeks transfer consistent with the concurring judge's observation that "the stakes here are personal reputation for a lifetime." Henri, 891 N.E.2d at 145.

SUMMARY OF ARGUMENT

This Court should grant transfer for four reasons. First, the Court of Appeals incorrectly decided an important issue of first impression by holding that a trial

court cannot consider any evidence beyond a juror's affidavit in deciding whether to grant a new trial based on an *ex parte* comment by a bailiff to the jury. Here, Judge Johnson was well within his discretion to credit one of "two differing versions of events" presented by the juror, and the law should allow him to do so. **Second**, the Court of Appeals did not consider that the jury apparently deliberated for about two (2) hours after the bailiff's comment, which supports rebutting the presumption of error because the comment did not result in a "sudden turn of events." **Third**, the bailiff's comment essentially repeated one of the trial court's final instructions. (Add.Tab#3.) Moreover, the same instruction adequately covered and explained the problem identified by the Court of Appeals in its split decision. **Fourth**, the Court of Appeals' analysis of the harm flowing from the cell phone conversation is directly at odds with another published decision by the Court of Appeals.

ARGUMENT

I. In a Matter of First Impression, the Court of Appeals Improperly Held That a Trial Court Cannot Consider Evidence Outside a Juror's Affidavit in Deciding Whether the Presumption of Harm Was Rebutted

Before taking the extreme measure of setting aside a jury's verdict based on an *ex parte* comment to a deliberating jury, this Court requires a reviewing court to undertake several considerations. First, the "determination whether to grant a mistrial is within the trial court's discretion and great deference on appeal is accorded the trial judge as he is in the best position to gauge surrounding circumstances of an event and its impact on the jury." Hernandez v. State, 761 N.E.2d 845, 851 (Ind. 2002) (quoting Reno v. State, 514 N.E.2d 614, 617 (Ind. 1987)). Also, in deciding

whether the presumption of harm is rebutted, this Court “evaluate[s] the nature of the communication to the jury and the effect it might have had upon a fair determination.” Rogers v. R.J. Reynolds Tobacco Co., 745 N.E.2d 793, 795 (Ind. 2001). Finally, the “effect of the communication may be gauged by the reaction of the jury.” Id. at 795.

The three-member appellate panel was at odds over whether Indiana trial judges have the discretion to evaluate evidence outside of a juror’s affidavit in deciding whether the presumption of harm was rebutted. Henri, 891 N.E.2d at 141-42 (J. Riley majority analysis); id. at 144-45 (J. Robb concurring analysis); id. at 145-46 (Chief Judge Baker dissenting analysis). Specifically, Judge Robb stated in her concurrence, “The law does not support weighing the allegations in a juror’s affidavit against the juror’s conduct at trial in order to determine which assertions are truthful as the dissent suggests.” Id. at 144-45. Neither of the two appellate cases cited by Judge Robb so hold, nor would such a limiting rule make sense. As noted by the dissent, id. at 145, such a holding also conflicts with the letter and spirit of the analytical rule recently utilized in Myers v. State, 887 N.E.2d 170, 195 (Ind. Ct. App. 2008) (“The trial court was in a better position than we are to gauge the jurors’ comportment at trial and their representations regarding their ... behavior.”). Finally, the rule crafted by the majority and concurrence paves the way for reviewing courts to second guess Indiana’s trial judges and substitute their judgment.

Here, not only did the affiant juror, Ms. Kirk, stand up during post-verdict polling and tell the “trial court that she agreed with the rest of the jury,” Henri, 891

N.E.2d at 145, but she also passed the trial judge “in the hallway as she was departing the court environs and [only] stated that this was a difficult verdict.” (App. 9: MTCE Order 4.) As credited by the trial judge, “At no time, however, did [Ms. Kirk] convey to me any problems or objections she may have had about the verdict to which she agreed nor how the verdict was reached.” (Id.) According to the Court of Appeals, this evidence of polling and the judge’s own interaction with Ms. Kirk means nothing and cannot be considered. That cannot be the law and is at odds with this Court’s recognition that trial judges are in the “best position to gauge surrounding circumstances of an event and its impact on the jury.” Hernandez, 761 N.E.2d at 851. Instead of deferring to the trial court’s judgment, the Court of Appeals relied solely upon a post-verdict affidavit – undoubtedly written by Henri’s attorney. This Court should grant transfer and clarify that trial judges have the discretion to consider circumstances outside of a juror’s affidavit in determining whether the presumption of error is rebutted. See Ind. App. R. 57(H)(1), (2), (6).

II. The Court of Appeals Did Not Consider The Length of the Jury’s Deliberations, or That Other Instructions Rebutted Any Presumed Harm

A. The bailiff’s comment did not create a “sudden turn of events”

As this Court noted in Rogers, “The effect of the communication may be gauged by the reaction of the jury. A short time interval between the [*ex parte* comment] and the verdict tends to support the presumption of error.” Rogers, 745 N.E.2d at 795 (comparing three cases, and noting that 5-minute and 10-minute intervals between an *ex parte* comment and a verdict warranted retrials based upon a

“sudden turn of events” but that a “one-hour deliberation” after an *ex parte* comment did not warrant a new trial).

In her Brief of Appellant, Henri unequivocally stated that “the jury deliberated for nearly two and a half hours.” (Appellant’s Br. 42.) The bailiff’s comment took place approximately “twenty minutes into deliberations.” Henri, 891 N.E.2d at 141. The resulting approximate 2-hour time interval indicates that the bailiff’s statement had no influence on the verdict. It was reversible error for the Court of Appeals not to consider or even discuss the time interval as rebutting the presumption of prejudice. This issue was vigorously debated during oral argument, and regardless of Henri’s counsel’s efforts to try and distance himself from what he wrote in his brief, no one can reasonably assert that there was a “sudden turn of events” here warranting a new trial. Instead, the Court of Appeals quotes at length from a Ninth Circuit case with a “five minute” interval following a bailiff’s comment that warranted a new trial See Henri, 891 N.E.2d at 142 (relying on Weaver v. Thompson, 197 F.3d 359 (9th Cir. 1999)). That situation is not remotely akin to what took place here.

B. The bailiff’s comment did not misstate the law; besides Final Instruction 15 rebutted any alleged harm caused by the bailiff’s comment

The Court of Appeals also did not acknowledge that the bailiff’s statement to the jury to “keep deliberating until [you] reach a unanimous verdict” had essentially repeated what Final Instruction 15 told the jury. (Add.Tab#3.) This issue was discussed at length during oral argument; it also was pivotal to the trial court’s decision not to order a new trial based on Ms. Kirk’s affidavit:

[I]n paragraph 6 Ms. Kirk states that she asked the bailiff if the decision would have to be unanimous. This statement is somewhat perplexing because Ms. Kirk had in her possession Final Instruction No. 15, which stated in writing that the verdict did, indeed, have to be unanimous and sat in the jury box while the court read this instruction telling her that a unanimous verdict was required.

(App. 7: MTCE Order 2); see Nesvig v. Town of Porter, 668 N.E.2d 1276, 1288 (Ind. Ct. App. 1996) (harm from bailiff's comment rebutted in part because the bailiff had "correctly stated the law as set forth by the jury instructions").

As for the Court of Appeals' belief that the bailiff's statement to "keep deliberating until [you] reach a unanimous verdict" was a misstatement of Indiana Code § 34-36-1-7 (concerning a hung jury), Henri, 891 N.E.2d at 141, it is unfounded and takes the juror's question out of context. More accurately, the Court of Appeals' analysis essentially rewrote the juror's question asking "if the verdict had to be unanimous" to one asking, "What happens if our verdict is not unanimous?"

Final Instruction 15 not only answered Ms. Kirk's specific question about whether the jury's "decision would have to be unanimous," but it also rebutted any alleged harm resulting from the bailiff's comment by clarifying that each juror "should not surrender [their] honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." (Add.Tab#3.)

By way of analogy, Indiana's appellate courts will not order a new trial based on alleged instructional error if "other instructions given by the court ... adequately informed the jury," Raess v. Doescher, 883 N.E.2d 790, 798 (Ind. 2008); accord Wal-Mart Stores v. Wright, 774 N.E.2d 891, 895 (Ind. 2002) (presumption of harm not

rebutted because the “instruction suffered from two [legal] flaws ...[and n]o other instruction corrected these problems”), reh’g denied; see also Northrop Corp. v. GMC, 807 N.E.2d 70, 96 (Ind. Ct. App. 2004) (“We find that Final Instruction 24 cures any alleged defect in Instruction 18. ...[F]inal Instruction 18 is not erroneous when read in conjunction with the remaining final instructions.”), trans. denied.

Accordingly, the same analysis should apply to claims of harm resulting from an *ex parte* communications deemed to be in the nature of an additional instruction. Indeed, this Court has previously found that harm resulting from an *ex parte* communication to a jury was rebutted by looking at other jury instructions. See Morgan v. State, 544 N.E.2d 143, 149 (Ind. 1989) (harm rebutted in part “because the jury was not instructed on any lesser included offense of attempted murder”). This case presents an opportunity to clarify that the jury instructions as a whole have a role in determining whether harm has been rebutted. See Ind. App. R. 57(H)(4), (6).

III. The Court of Appeals’ “Outsides Influences” Analysis Is Unsound and Conflicts With Prior Court of Appeals Precedent

A. The cell phone call was not an obstacle to a fair trial

The two-judge majority also held that a juror’s brief response to a cell phone call that “she would get to class as soon as she could” was an outside influence that “could have become an obstacle to a fair determination of the case.” Henri, 891 N.E.2d at 143. The trial court had believed the opposite, and explained so in detail. (App. 8-9.) In support of its holding rejecting the trial court’s reasoning and substituting that of its own, the 2-judge majority quoted dicta from Pagan v. State, 809

N.E.2d 915, 922 (Ind. Ct. App. 2004), trans. denied. However, Pagan held the opposite, which the Court of Appeals ignored:

Pagan did establish, through the bailiff's post-trial testimony, that extrajudicial communication occurred during deliberations. However, he did not establish that the communications pertained to any matter being considered by the jury; as in Bryant [v. State], 246 Ind. 17, 202 N.E.2d 161 (1964), *the phone calls were related to purely personal matters of the jurors, in this case the fact that they would not be home for dinner or other evening activities*. Although it may have been, strictly speaking, improper for the jurors to interrupt deliberations by making phone calls, especially without prior court knowledge or approval, *such behavior was excusable under the circumstances* and cannot be labeled "gross" misconduct. ...

Pagan, 809 N.E.2d at 922 (emphases added). Transfer is warranted. See Ind. App. R. 57(H)(1).

B. The annoying alternate juror was not an obstacle to a fair trial

The Court of Appeals also held that the alternate juror's annoying antics represented "one more obstacle to a fair determination of the case," Henri, 891 N.E.2d at 144, injecting that the alternate's "hijinks ...may have amounted to active participation in the deliberative process." Id. The trial court had disagreed. (App. 8.) The Court of Appeals did acknowledge that without the *ex parte* communication, the alternate juror's antics would probably not have warranted a new trial, given this Court's decision in Griffin v. State, 754 N.E.2d 899, 901 (Ind. 2001.)

Nevertheless, in substituting its analysis for the trial court's on the effect of the alternate juror's actions, the Court of Appeals disregarded the trial court's reasoning that (i) all jurors were polled and agreed with the verdict, and (ii) the alternate juror was polled independently and responded, "No," as to whether she had participated in the deliberations. (App. 9.) Yet, Griffin (the case cited by the major-

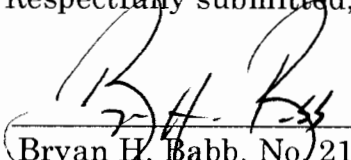
ity) stands for the important principle that post-verdict polling of jurors is evidence that should be considered when determining whether harm has been rebutted. See Griffin, 754 N.E.2d at 901. (“In fact, each of the jurors was individually polled after the verdict and each orally said it was their individual and collective verdict.”). In sum, neither the bailiff’s comments, nor the two outside influences, warrant the extreme measure of a new trial and a continuation of this nightmare for Curto and his parents.

CONCLUSION

Curto respectfully requests that this Court grant the Petition to Transfer, vacate the published 2-1-1 opinion of the Court of Appeals, reinstate the jury’s verdict based on arguments fully briefed before (but never reached by) the Court of Appeals, and remand for a determination of reasonable fees for an appellate brief that, among other things, repeatedly defames Curto as a rapist and also claims that Judge Johnson raped Henri by his “improper handling of the jury.”

Respectfully submitted,

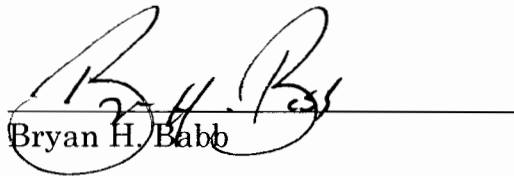
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I hereby certify that a copy of the foregoing was served upon the following by
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